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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 72

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, Et Al.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1939

No. 995

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, Et Al.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent respectfully shows:

Petitioners, Henry J. Beal, and other enforcement officers, appearing by the Attorney General of the State of Nebraska, petitioned for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, in the matter of Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Appellants, vs. Missouri Pacific Railroad Corporation in Nebraska, Appellee, No.

11,465, decided January 18, 1940; rehearing application denied February 12, 1940.

The case was originally heard by the Hon. James A. Donohoe, District Judge, and a decree was entered in favor of the Respondent herein. An appeal was had to the Circuit Court of Appeals, and the case was heard before Stone, Gardner and Sanborn, Circuit Judges. The decision of the District Court was affirmed.

—o—o—

NATURE OF THE CASE

This was a suit in equity, brought by the Missouri Pacific Railroad in Nebraska, a Delaware corporation, against the petitioners, including the Attorney General of the State of Nebraska, and certain other law enforcing officers of that State, to enjoin them from the enforcement of the Nebraska Full Train Crew Law, as wrongfully construed by such officers so as to require the discharge of colored brakemen long employed by respondent.

Defendants below moved to dismiss the suit for want of equity. This motion was denied, and Judge Donohoe's opinion, in overruling said motion, entered June 30, 1936, appears on page 16 of the printed record.

Thereafter answer was filed, which, for the most part, admitted all of the allegations of fact contained in the petition. The petition was very voluminous and purposely set out the facts in great detail.

On December 2, 1938, the case came on for hearing, and the District Court, upon a thorough examination of

the pleadings, including the answer and the admissions contained in the answer, found in favor of the respondent. The Court found that there was a misconstruction or mis-interpretation of the statute of the State of Nebraska by the defendant law enforcement officers and enjoined its enforcement as unlawfully and erroneously construed.

As we will hereinafter explain, the case involved an interpretation of the Full Train Crew Law, a law requiring certain crews upon passenger trains operated in the State of Nebraska.

The Court found from the pleadings that there was a compliance with the statute in controversy by the respondent and that petitioners claim that respondent operated its trains in violation of the statute was the result of an unlawful construction and interpretation of the statute by the defendants or petitioners.

The Court likewise found that there was nothing further to be tried upon the merits. The Court thereupon entered an injunction, as prayed for by the respondent. This was entered on the 2nd day of December, 1938.

There was an attempt on the part of the plaintiff and defendants below to set forth in the pleadings all of the facts. The petition filed alleged in great detail the relevant facts, and the answer of the defendants admitted, for the most part, the facts alleged. An examination of the pleadings will show that there was no necessity for the taking of any testimony—all of the necessary facts were agreed upon in the pleadings. Therefore, it becomes necessary, in a statement of the nature of the case, to analyze the pleadings.

The Nebraska Statute involved is known as the "Full Train Crew Law." Section 1 (74-519, Comp. St. of Neb., 1929) provides the crew requirements for passenger trains in the State of Nebraska, and provides that a passenger train having more than five cars should have a crew consisting of not less than one engineer, one fireman, one conductor, one brakeman, and one flagman. If the train consists of less than five cars, the crew must be one engineer, one fireman, one conductor, and one brakeman or flagman. This statute was originally passed in the year 1909 and is set out on page 2 of petitioner's brief. Section 2, set out fully on the same page of petitioner's brief, provides penalties for violation of this statute. The penalties provided are not less than $100.00 nor more than $1,000.00 for each offense. (Each movement of the train in violation of the statute is an offense.)

The statute further provides as a penalty that the company and its officers should be liable for any damage caused by violation of the provisions of the Act.

—o—o—

ANALYSIS OF PLEADINGS

It is alleged in plaintiff's petition (Par. VI, pp. 8 and 9, Rec.), and is admitted in the answer of the defendants, that the Missouri Pacific passenger trains 109 and 110 operate with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, one man qualified to perform and performing the duties of brakesman desig-

nated "brakeman and porter" (Par. VI, Ans. pp. 22 and 23, Pr. Rec.).

It is alleged in the petition and admitted, that the duties of "brakeman and porter"—a colored man— consist, substantively, in assisting the conductor in receiving and discharging passengers, and under the direction of the conductor, assisting in the directing of the train operations generally; that his station is in or about the train, particularly in the middle of the train, unless particular duties call him elsewhere (Par. VI, Ans. pp. 22 and 23, Pr. Rec.).

It is admitted that when his brakeman duties permit, he does porter work necessary, but that this does not include cleaning of the cars (Par. VI, Ans. p. 23, Pr. Rec.).

It is alleged in the petition and admitted in the answer that the colored men designated as "brakeman and porter" pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of brakemen and flagmen (Par. VI, Ans. p. 23, Pr. Rec.).

It is admitted that the original proceedings to enforce this Full Crew Bill were instituted by J. F. Moredick, an official of the Brotherhood of Railway Trainmen, and it is alleged in the petition, and admitted in the answer, that in his testimony before the Railway Commission, in the hearings before that body to compel the railroad to discharge the colored men and hire white men as brakemen, Mr. Moredick testified as follows (Par. VII, p. 10, Pr. Rec.; Par. VII Ans. p. 24, Pr. Rec.):

> "I don't know, Mr. Kirk, that this is particularly material, but I just wanted to bring it to the attention of the Commission—the fact that the B. of R. T. in

> our general agreements committee in St. Louis in 1921 asked the Missouri Pacific Railroad to place the porter-brakemen on the B. of R. T. Seniority list, and I am going to tell the Commission, because it isn't a matter that is secret, that the principal cause for this was to not only let the white man get some of these good jobs, but to get rid of the colored men. I think Mr. Kirk will agree."

After the passage of the bill, J. F. Moredick, an officer of the Brotherhood of Railway Trainmen, an organization of white railroad brakemen, filed a complaint before the Nebraska State Railway Commission, charging the Missouri Pacific with operating its passenger train Nos. 109 and 110 in violation of the statute, in that the requirement of one brakeman was not complied with, as the trainman who did the brakeman's work was referred to by another designation. On June 2, 1928, the complaint was dismissed. On January 20, 1931, Mr. Moredick again filed a complaint before the Nebraska State Railway Commission, again alleging that for the reason above indicated, the Missouri Pacific operated its trains 109 and 110 in violation of the statute. Upon a hearing, the evidence being substantially the same, the Commission, on March 1, 1932, again dismissed the complaint. In April, 1932, Mr. Moredick sought a rehearing. A rehearing was granted. No additional evidence was offered by Mr. Moredick. At that hearing, it is alleged in the petition, evidence was offered that the "brakeman and porter" and each of the members of the train crews were qualified in every way to discharge the duties of their respective positions, the brakeman and porter completely performing the duties of the brakeman, and when the brakeman's duties permitted, doing some porter work. These facts are all admitted in the answer of the defendant filed in this case (Par. IV, V and VI, pp. 21 to 23, Pr. Rec.).

The opinion of the Commission, as alleged in the petition, and its order, are as follows:

"Opinion.

"After investigation of all the testimony, the Commission is of the opinion and so finds that so far as the safety of the traveling public is concerned, the trains in question, Nos. 109 and 110, are adequately manned, and that said trains, Nos. 109 and 110, being trains of more than five cars, are being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman. The Commission finds that each one of the five railroad employees of said train performs one of the duties required by said Section 74-519, and that each employee in his particular work has passed the regular examination for said work and is fully qualified to perform the same. The Commissions' attention was more particularly called to the colored trainman, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929.

"Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service (fol. 9) to the public are ade-

quately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed.

"Order.

"It Is Therefore Ordered by the Nebraska State Railway Commission that the defendant comply fully with Section 74-519, C. S. of 1929, and that the Attorney General of the State of Nebraska be advised that on the 20th day of January, 1931, and at other times subsequent thereto, the Missouri Pacific Railroad Corporation in Nebraska, did operate over its road in Nebraska, outside of the yard limits, a passenger train carrying passengers, whose regular equipment consisted of more than five cars with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman, and one man qualified to perform and performing the duties of flagman, but that the man qualified to perform the duties of brakeman was not designated and known as brakeman but was designated and known as trainman.

"It Is Further Ordered by the Nebraska State Railway Commission that the records and files in this case and of the Commission be and they hereby are made available to the Attorney General of the State of Nebraska for his use in prosecuting the Missouri Pacific Railroad Corporation in (fol. 10) Nebraska for the violation of any criminal statute which he may feel this act constitutes."

That the above was the opinion and the order was admitted in the answer of the defendants (see pp. 4 to 11 and pp. 21 to 25, Pr. Rec.).

It is alleged in the petition and admitted in the answer that under the plaintiff's contract with the colored brakemen, the wage scale is $120.00 per month. It is further alleged and admitted that if the plaintiff was required to hire white brakemen in place of colored brakemen, the wage scale under the contract with the B. of R. T. would be approximately $200.00 per month, and the plaintiff alleges, in Paragraph VIII, and the defendant's answer, in Paragraph VIII, admits, that the substitution of white brakemen in place of colored brakemen would result in increasing plaintiff's expenses in the operation of its passenger trains under consideration, in Nebraska, to the extent of approximately $6,700.00 per year (p. 25, Pr. Rec.).

Thus it appears that the statute requires trains of more than five cars to have, besides the engine crew, one conductor, one brakeman and one flagman, and it appears without dispute that the Company, besides the engine crew, has one conductor, one "brakeman-porter" and one flagman. It appears that the man designated as a "brakeman and porter" is a colored man; that he takes exactly the same examination, physical and mental, as do the white brakemen and flagmen, and that he is just as well qualified as a white brakeman or flagman. It is admitted by defendants that the substitution of a white brakeman for a colored brakeman would cost the Company approximately $6,700.00 a year.

It is admitted in the pleadings that the Nebraska State Railway Commission has found, after a hearing, that this colored brakeman-porter was capable of performing all of the duties of a brakeman and flagman and that he had passed the same examinations required of one who bears the title of brakeman.

The Nebraska State Railway Commission found, after a hearing, *that so far as public safety is concerned, the trains in question are adequately manned.* The Commission, however, held that—

> "So far as a literal interpretation of the statute is concerned, trains 109 and 110 (which employ the brakeman and porter as one of the crew) are not operated by employees bearing the titles set forth in Sec. 74-519, which makes the defendant company (Missouri Pacific) liable for criminal prosecution under Sec. 74-522, C. S. Neb., 1929."

It will be noted that the statute does not require that the crew be designated with any particular title, but only defines what the crew shall consist of.

It was further admitted in the pleadings that the Nebraska State Railway Commission found as follows:

> "Therefore in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service to the public are adequately cared for by the crew as we find it to be constituted, The Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities a misdemeanor has been committed." (Opinion and Order, pp. 6, 7 and 21, Pr. Rec.)

The Commission then in its order found that the Company's trains 109 and 110 operated with a crew consisting, besides the engine crew, of one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman and one man qualified to perform and performing the duties

of flagman, but that the man qualified to perform and performing the duties of brakeman *was not designated and known as a brakeman, but was designated and known as trainman* (pp. 5, 6, 7 and 21, Pr. Rec.).

The Commission further ordered that its files be available to the Attorney General for his use in prosecuting the Missouri Pacific Railroad Company for the violation of any criminal statute which he may file, which the Company's acts warranted.

It thus appears that after three hearings before the Railway Commission the matter was referred to the Attorney General.

The plaintiff Railroad Company thereafter brought this suit. The suit was brought in October, 1932. The defendants filed a motion to dismiss, in November, 1933. This was called up for hearing in the April Term, 1936, and on June 30, 1936, after full argument and after the matter had been briefed by both parties and submitted to Judge Donohoe, he overruled the defendant's motion to dismiss.

Judge Donohoe's opinion is set out on page 16 of the printed record.

The defendants, in July, 1937, filed their answer. This appears on page 20 of the printed record.

Defendants in their answer admit the allegations of plaintiff's petition, having to do with the proceedings before the Nebraska State Railway Commission. They admit the allegations of diversity of citizenship. They admit that the defendants are law enforcement officers of

the State of Nebraska and that a certain number of the defendants are members of the Nebraska State Railway Commission. They further admit as follows; we quote the following paragraphs from the answer (p. 20, Pr. Rec.):

"VI.

"Admit that the plaintiff in the conduct of its passenger trains Nos. 109 and 110 operated and operate same with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of 'brakeman and porter,' but deny that such operation fully meets all requirements and intendments of said statute.

"Admit that said trainmen were and are severally designated as engineer, fireman, conductor, flagman and 'brakeman and porter,' but deny that said statute makes no requirement whatsoever as to how and in what manner the railroads shall entitle their employees on the trains.

"Admit that in addition a qualified baggageman-expressman handles baggage and express.

"Admit that the trainmen performing the duties of 'brakeman and porter' on said trains Nos. 109 and 110 were and are colored men.

"Admit that said colored men pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of 'brakeman' and 'flagman.'

"Admit that the duties of a 'brakeman and porter' consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction (fol. 31) of the conductor assisting the the protecting of the train operation generally,

the 'brakeman and porter's' place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere.

"Admit that when the 'brakeman and porter's' duties permit, he does whatever porter work may be necessary, and admit that this does not include cleaning the cars, but as to whether or not such porter work is negligible in volume these defendants have no knowledge, and, therefore, deny that the same is negligible."

"VII.

"Answering the allegations of paragraph VII of the petition, defendants admit that the colored men doing the brakemen's work on the passenger trains Nos. 109 and 110 as brakemen take all of the required mental and physical examinations to qualify as brakemen and perform (satisfactorily) all of the brakeman's duties, but as to whether or not the plaintiff refrains from designating the said colored men as brakemen by reason of any contract with the Brotherhood of Railroad Trainmen, as in the petition set out, the defendants have no knowledge and, therefore, deny the same.

"Admit that the Brotherhood of Railroad Trainmen, through its then official representative J. F. Moredick, cause the filing of the said complaints before the Nebraska State Railway Commission, but aver that they have no knowledge of the purpose of said Brotherhood or of said complainant in the filing of said complaint and, therefore, deny that the purpose of said complaint was not to seek any improvement in the train service of the plaintiff's railroad company, and further deny that it was the purpose of said complaint, through a purposeful, arbitrary, wrongful (fol. 32) and unlawful interpretation of and administration of said statute to so harass and coerce plaintiff as to force from their positions the colored trainmen.

"Defendants admit that complainant Moredick gave the testimony set forth in said paragraph before the Nebraska State Railway Commission, and state that they have no knowledge on the subject, and, therefore, deny all and singular the allegations of the plaintiff that the object of the complaints filed by the said J. F. Moredick was not to better the train service of the plaintiff company, or to advantage in any way the people of Nebraska, but through an arbitrary, unlawful and illegal construction of said statute to obtain in some tribunal a finding that as these colored men worked under the designation on their employer's records of 'brakeman and porter' instead of under the literal designation of 'brakeman,' the statutory requirement of a 'brakeman' in a passenger train crew would not be complied with, notwithstanding that the colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakemen to the entire satisfaction of the plaintiff railroad company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of plaintiff railroad company in Nebraska.

"Defendants further aver that whatever the object and purpose of the Brotherhood of Railroad Trainmen or its then representative, J. F. Moredick, may have been at the time of the institution of said proceedings before the Nebraska State Railway Commission, the same is entirely immaterial in the instant action, for the reason that the order entered by the Nebraska State Railway Commission founded (fol. 33) upon said complaints of said J. F. Moredick had no legal effect whatsoever as aforesaid, and whatsoever action may be taken hereafter towards the enforcement of said statute will be taken under the construction thereof made by the Attorney General of the State and by the law enforcement officers thereof acting under his advice and direction, and without any regard whatsoever to any object and purpose which

may have been contemplated or entertained by said Brotherhood of Railroad Trainmen or its then representative.

"VIII.

"Answering the allegations of paragraph VII of said petition, admit that the plaintiff company's contracts with the colored brakemen call for a wage scale of approximately $120.00 each per month and admit that if plaintiff were required to hire white brakemen in place of the colored brakemen (which defendants deny for lack of knowledge to have been the objective of said Moredick and expressly deny to be the object of the defendants herein) the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration of approximately $6,700.00 per annum.

"Deny that this expense would be needless or an absolute waste of that amount of money, or an unlawful burden and an unjust exaction upon the plaintiff and upon interstate commerce; deny that the service being rendered by the (fol. 34) colored brakemen, as stated, are competent and satisfactory in every way to all interests other than the complainant, Moredick, and his associates, for the reason that the defendants have no knowledge in that behalf.

"Admit that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

"Deny that an annual increased expense of $6,700 imposed on plaintiff would reflect and constitute a gross loss of at least $125,000.00.

* * * * *

"X.

"Answering the allegations of Paragraph X of the petition, the defendants admit that the penalties provided by said statute are as set forth in the petition, and that as the plaintiff company operates trains Nos. 109 and 110 into and out of Nebraska daily, making within a year's time 1,460 train movements, that at the maximum possible fine of $1,000.00 for each conviction obtained this would represent gross fines of $1,460,000.00 per year, but the defendants (fol. 36) deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises."

—o—o—

NATURE OF CASE—Continued

The District Court and the Circuit Court of Appeals found that the defendant had complied with both the letter and spirit of the Act. The respondent had a crew consisting of an engineer, a fireman, a conductor, a colored brakeman and one flagman. Because of the fact that the colored brakeman could not be a member of the union composed of white men, and because of the fact that this brakeman, when his services as brakeman were not needed as such, did a little porter work, such perhaps as raising car windows, etc.,—not, however, including the cleaning of cars,—he was designated as "Brakeman and Porter."

It is admitted by all that he took all the same tests and examinations as a brakeman; that he passed them all, and that he was a fully qualified brakeman and that he performed all of the duties of a brakeman. But he

was a colored man and it was admitted that the organization instituting the proceedings out of which this suit grew had for its purpose (according to testimony admitted to have been given) the displacement of the colored man. There was no claim that the law was unconstitutional, but the plaintiff below asserted that the enforcement officers of the State erroneously interpreted the Act and the Respondent herein contended below that if the law was enforced according to such misinterpretation and misconstruction, it would be an unconstitutional invasion of the respondents' property rights.

The Circuit Court of Appeals, after reviewing the pleadings, and especially the admissions and the answers contained below, stated—

> "Plaintiff has equipped its trains with a full crew, complying at least numerically with the provisions of the statute. It has designated one of its crew as a 'brakeman and porter', or 'brakeman-porter.' This man takes exactly the same examinations, mental and physical, required of white brakemen and flagmen, and the Nebraska State Railway Commission has determined, after a careful investigation, that 'so far as public safety is concerned, the trains in question are adequately manned,' and that 'safety for and service to the public are adequately cared for by the crew.' These employees do the work of brakemen to the entire satisfaction of the Railroad Company and to the entire satisfaction of the Nebraska State Railway Commission. The fact that they may do some porter work, if and when their duties as brakemen permit, is not, we think, material. Under the record they are primarily brakemen and perform all the duties of such an employee. The act, as we have observed, is a safety measure, and not one primarily in the interest of any particular employees or class of employees."

It thus appears, from an examination of the allegations and admissions in the pleadings, that the respondent's passenger trains Nos. 109 and 110 operate with crews consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of flagman, and one man qualified to perform and performing the duties of brakeman, designated "brakeman and porter;" that the trainman performing the duties of "brakeman and porter" on these trains Nos. 109 and 110 were and are colored men, who have passed all examinations, mental and physical, and fulfill all other requirements set up for the qualification of brakemen and flagmen; that the duties of a brakeman and porter consist, substantially, in assisting the conductor in the receiving and discharging of passengers and, under the direction of the conductors, assisting and protecting the train operation generally. That the "brakeman and porter's" place around the train is at or near the middle of the train, unless particular duties call him elsewhere; that when his duties as brakeman permit, he does whatever porter work may be necessary: This, however, does not include the cleaning of the cars, which, of course, is done at the terminals.

These facts are all alleged in the petition and admitted in the answer.

It appeared that after the Full Crew Bill was passed, an original proceeding to enforce the Act was instituted before the Nebraska State Railway Commission, seeking to accomplish the discharge of the colored men and the employment of white men as brakemen and, as stated in

the opinion of the Circuit Court of Appeals, the individual instituting the proceedings testified, among other things [this is alleged in Par. VII of petition (p. 10 P. R.) and admitted in defendant's answer, Par. IV (p. 21 P. R.], that the principal aim of the proceedings *was to not only let the white men get some of these good jobs, but to get rid of the colored men.* This individual, a Mr. Moredick, who made this statement and who was an officer of the Brotherhood of Railway Trainmen, an organization of white railroad brakemen, filed the complaint before the Nebraska State Railway Commission, charging the respondent had operated these passenger trains 109 and 110 in violation of the statute, in that the requirement of one brakeman was not complied with, as the trainman who did the brakeman's work was referred to by any other designation, i. e., "brakeman and porter." The original proceeding was commenced before the Nebraska State Railway Commission on April 3, 1928, and was dismissed. On January 20, 1931, the same party filed a complaint with the same Railway Commission, again charging a violation of the statute. This complaint was again dismissed by the Commission, on March 1, 1932, but in April, 1932, on application of this same Mr. Moredick, a rehearing was granted by the Nebraska State Railway Commission. At the hearing evidence was offered to the effect that the "brakeman and porter," and each of the members of the train crew, were qualified in every way to discharge their duties, and that the "brakeman and porter" completely performed the duties of brakeman, and when the brakeman's duties permitted, he did some porter work.

The Nebraska State Railway Commission recited that after investigation of all the testimony it was of the opinion, and so found, that so far as the safety of the

traveling public was concerned, the trains in question, Nos. 109 and 110, were adequately manned, and were being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman and one flagman. That each of the five employees regularly performed the duties required by the Full Train Crew Law; that each of the employees had passed the regular examinations required for said work, and was fully qualified to perform the same.

The Commission stated that its attention was more particularly called to the colored trainman performing the duties of "brakeman and porter," and the order states that "careful investigation discloses that *although this man's race and color disqualified him from holding the position of brakeman,* he is capable of performing all these duties, and has passed the same examination required of one who bears the title of 'brakeman.'" (He cannot have the title of "brakeman" unless he is a member of the Brotherhood of Railway Trainmen, the white organization.) *The Commission was therefore of the opinion, and found that so far as the public safety is concerned, the trains in question are adequately manned.* The Commission was, however, of the opinion "that so far as a literal interpretation of the statutes is concerned, Trains 109 and 110 are not operated by employees *bearing the titles set forth in Sec. 74-519,* which makes the defendant company liable for criminal prosecution under Sec. 74-522."

Therefore, the Commission referred the matter to the Attorney General "so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed."

The Commission further ordered that the Attorney General be advised that the Railroad Company was operating its passenger trains "with a properly qualified crew," except that "the man qualified to perform the duties of 'brakeman' was designated and known as 'trainman.'" (All of these statements in re the proceedings before the Railway Commission were admitted in defendant's answer, Par. VII, p. 23 P. R.)

The order of the Commission further provided that its files be made available to the Attorney General in prosecuting the Railroad Company for violating the statute. It appears without dispute that under respondent's contract with the colored brakeman, the wage scale is $120.00 per month, but if the respondent was required to hire white brakemen, under its contract with the Brotherhood of Railway Trainmen, the respondent would have to pay approximately $200.00 per month to the brakeman, and it is admitted in defendant's answer that the substitution of white brakemen in place of colored brakemen would increase the expense of operating the passenger trains involved to the extent of $6,700.00 per year (Par. VIII, p. 25 P. R.).

It was admitted in defendant's answer that during the year there would be 1,460 train movements of trains 109 and 110 which, at the maximum possible fine of $1,000.00, would represent gross fines of $1,460,000.00 per year (Par. X, p. 26 P. R.).

It therefore appears that the respondent had thrice been brought before the Railway Commission and had had three hearings.

The defendants filed a joint answer and, in paragraph VI (p. 22 P. R.), the defendants alleged that the

plaintiff below operated its trains with a crew consisting, in addition to the engine crew, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of "brakeman and porter," *"but deny that such operation fully meets all requirements and intendments of said statute."* The answer likewise admits that the crew consists of one man qualified to perform and performing the duties of a flagman.

In Paragraph VI of their answer (p. 23 P. R.), *the defendants below denied that the statute made no requirements as to how the plaintiff below should entitle its employees on the train.*

It is apparent from the pleadings that it was the attitude of the defendants below, notwithstanding all of the admissions in their answer, that the Missouri Pacific did not comply with the statute, but was operating its trains in violation of the statute.

No contention is made in petitioner's brief that this construction and interpretation were not erroneous, although they did so contend in the lower courts. The Circuit Court of Appeals, passing on this very proposition, said:

> "We think there has been a compliance with both the letter and spirit of the Act." (p. 43 P. R.)

Under such circumstances, the District Court found that the law enforcement officers were misconstruing the Act and that, having in mind the penalties involved, and having in mind the respondent's contract with its colored brakemen and their organization, respondent was entitled to injunctive relief against further harassment and further criminal proceedings.

As has been said before, no sustainable contention can be made that the petitioner is not fully complying with the Act, and *it is apparent that the sole purpose of all these proceedings is to attempt to compel the defendant to dismiss its colored brakemen and to employ white brakemen in their place. Of course, this was admitted in the testimony of Mr. Moredick before the State Railway Commission, which testimony is set out in the plaintiff's petition* (Par. VII, p. 9 P. R.), *and it was admitted in the defendant's answer below that such quoted testimony was given* (Par. IV, Ans. p. 21 P. R..

No claim is made that any question of public safety or service was involved.

It was likewise admitted, in Paragraph VIII of the defendant's answer (p. 25 P. R.), *that the Company's contract with its colored brakemen called for a wage of approximately $120.00 each month, and in said paragraph the defendants admit "that if plaintiff were required to hire white brakemen in place of the colored brakemen * * * the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month," and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration, of approximately $6,700.00 per annum.*

The same paragraph likewise admits that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

Thus, it was admitted in the plaintiff's answer, that on the two trains in question the respondent would be

required to pay $6,700.00 a year more than it has to pay under its contract with the colored organization. It was further admitted, in paragraph X of the defendant's answer (p. 26 P. R.), that the maximum possible fine for a year's operation of the trains in question would amount to $1,460,000.00 per year.

After the order entered by Judge Donohoe in the District Court, the petitioners herein appealed to the Circuit Court of Appeals. In appealing, the petitioners herein set forth their statement of points relied upon, and these are the only assignments of error or statement of points relied upon. These appear on pages 33 and 34 of the printed record. We quote them:

"The defendants intend to rely on appeal on the following points:

"1. The Court erred in finding that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman porter, or as a porter, as described in the pleadings, was in compliance with the provisions of Section 54-519, Compiled Statutes of Nebraska, 1929.

"2. The Court erred in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees, or successors in title, for an alleged violation of Section 74-519, Compled Statutes of Nebraska, 1929, because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter, for the following reasons:

"[fol. 45] (a) Because it does not appear that the defendants or any of them are in error in their construction of said statute, but on the contrary that the Court erred in point of law in its construction of the statute, both in its finding and in its decree.

"(b) Because, assuming the defendants or any of them to be in error in their construction of the statute, even then, a decree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that

"(1) The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid statute, because of an alleged misconstruction of such statute by administrative state officers.

"(2) To permit this suit to be entertained is to permit a suit to be prosecuted against a sovereign state by a citizen of another state in defiance of the provisions of the Eleventh Amendment to the Constitution of the United States."

The opinion of the Circuit Court of Appeals in affirming the lower Court's decision is by Gardner, Circuit Judge, and appears on page 38 of the printed record. It takes up and discusses fully all the points relied on by appellants below.

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NATURE AND PURPOSES OF CERTIORARI JURISDICTION

The power to issue Certiorari rests in the exercise of sound judicial discretion by this Court.

As such, this Court has held it to be a power which should be exercised sparingly and with great caution, and

only in cases of peculiar gravity, and in order to secure uniformity of decision. The Court has frequently said that review on Certiorari is not a matter of right, and that the granting of the Writ is a highly selective process.

In his remarks before the Judiciary Committee of the Senate, on March 25, 1935, Mr. Chief Justice Hughes commented upon the Certiorari jurisdiction as follows:

> "The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, because of the character or prominence of the parties, or because of the counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to the counsel, but as to the law. The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved. * * *"

Thus, in line with the above, Mr. Justice Frankfurter, speaking to the issue, in *Federal Power Commission vs. Pacific Power & Light Company*, 83 L. Ed. 664, said:

> "The case is here on certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted because of the intrinsic importance of the issue raised and of a conflict between the decision below * * * and that of the Circuit Court of Appeals for the Second Circuit. * * *"

This Court, in *Rules of the Supreme Court, Rule 38; Paragraph 5,* has issued a comprehensive statement of

the principles governing the exercise of its discretion on Certiorari, sub-paragraph (b) being the portion particularly applicable in the present case:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * * * *
>
> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

In *Magnum Import Co. v. DeSpoturno Coty*, 262 U. S. 159, 163, 67 L. ed. 922, this Court, in a certiorari case, said:

> "The question how the court should exercise this power (certiorari) next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases in-

volving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court another hearing.*" (Italics ours.)

This case was cited in the recent case of *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 208, 82 L. ed. 1290.

The rule is stated clearly and succinctly in *Forsyth v. Hammond*, 166 U. S. 506, 514, 515, 41 L. ed. 1095:

> "While this power (certiorari) is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

This Court said in *Hamilton-Brown Shoe Company v. Wolf Bros. & Co.*, 240 U. S. 251, 258, 60 L. ed. 629:

> "As has been many times declared this (certiorari) is a jurisdiction to be exercised sparingly, *and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.*" (Citing U. S. cases.)

In *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, 383, 37 L. ed. 486, this Court said:

> "It (certiorari) has been held to be a branch of jurisdiction which should be exercised sparingly and

with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

It is readily apparent, from a reading of the opinion of the Circuit Court of Appeals, that that Court considered all of the points relied upon by petitioners.

We cannot understand the remark in petitioner's brief to the effect that the Circuit Court of Appeals failed to consider the matter of equity jurisdiction. A mere reading of the opinion, commencing at the bottom of page 43 of the printed record, shows that the petitioner's claim that the Circuit Court of Appeals did not consider the matter of equity jurisdiction is entirely unfounded.

It will be noted that the Court discusses this very proposition on pages 43, 44 and 45 of the printed record.

There is no basis for a claim that the Circuit Court of Appeals departed from the accepted and usual course of jurisdictional proceedings, or sanctioned such a departure by a lower court. There can be no claim that a question of Federal law was decided which should be settled by the Supreme Court, or that the Circuit Court of Appeals rendered a decision in conflict with applicable local decisions or with the decision of another Circuit Court of Appeals on the same subject. This application is, of course, an attempt to obtain another hearing on matters peculiar to this controversy, and to this controversy alone. Below petitioners contended that equity had no jurisdiction to enjoin the enforcement of a state act by the state law enforcement officers as unlawfully misconstrued by such officers. Petitioners claimed that equity was without jurisdiction unless the statute was attacked as unconstitutional. The Circuit Court of Ap-

peals passed on this question in conformity with the previous decisions of this Court and now no claim is made that its decision was or is erroneous.

PETITIONERS' SPECIFICATIONS OF ERROR OR REASONS FOR REVIEW

"The Circuit Court of Appeals erred—

"(1) in deciding an important question of general law in a way untenable and in conflict with the weight of authority;

"(2) that it has erred in deciding a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this Court; and

"(3) that it has erred in so departing from the accepted and usual course of judicial proceedings, and so sanctioned such departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision."

Petitioners discuss these three specifications of error. We will do likewise.

Petitioners assert that the Nebraska Full Train Crew Law is constitutional. Respondent did not allege or claim that the Act as passed was unconstitutional. Respondent alleged a misconstruction of the Act. Following a quotation from the opinion of the Circuit Court of Appeals, petitioners assert that the lower court erred in supposing that threatened property damage appeared from the allegations of the petition which were admitted in the

answer. Petitioners assert that the pleadings disclosed no threatened damage to property or threatened multiplicity of suits.

An examination of Paragraph VIII of defendant's answer (p. 25 P. R.) will show that it is admitted that if the respondent was required to discharge its colored brakemen and hire white brakemen, it would pay out in salaries an additional sum of $6,700.00 per year on two of its passenger trains. Paragran VIII of the answer likewise admits that the scale paid to the colored brakemen is according to the mutual agreement between the colored brakemen and the respondent. That is, it is admitted in the answer that the Company has a contract with the colored brakemen, and that, considering the movements of two trains alone, a violation of the contract would cost the respondent $6,700.00 a year. This is admitted in Paragraph VIII of petitioners' answer (p. 25 P. R.).

In Paragraph X of the answer filed by petitioners below (p. 26, P. R.), the defendants below admitted that the penalties provided by the statute involved, as applied to the respondent's operation of trains 109 and 110, making, within a year's time, 1,460 train movements, involve maximum possible gross fines of $1,460,000.00 per year. Defendants alleged that they have no intention of bringing any action for penalties "unless and until a test action has been brought and prosecuted to final determination, which shall fully determine plaintiff's liability in the premises."

On page 9 of petitioner's brief, certain paragraphs from defendant's answer appear. In this the Attorney General alleges as follows—

"nor will he seek by means of such test suit or action to inflict financial penalties or loss upon the the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute."

That a relationship of employer and employee is a property right was held in the leading case of *Truax v. Raich*, 239 U. S. 32, 60 L. Ed. 131 (1915), in which the Supreme Court found that an alien employee was entitled to an injunction against the criminal prosecution of his employer under an unconstitutional law regulating the employment of aliens in Arizona. The Supreme Court there said:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. * * * The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of

authority, the unjustified interference of third persons is actionable although the employment is at will. * * *"

It is clear that the relationship would also be a property right in the employer.

It has been held that the enforcement of Full Crew Statutes involves property rights of the railroad. In the case of *Missouri Pacific R. Co. v. Norwood, Attorney General of Arkansas*, 42 F. (2d) 765 (D. C., Ark., 1930), before Stone, Circuit Judge, and Munger and Faris, District Judges, it was said in the *per curiam* opinion:

> "* * * Obviously, a property right of plaintiff is involved in the enforcement of these statutes. Where such is the case and where a multiplicity of such prosecutions are involved, a court of equity may intervene even though the effect is to enjoin the enforcement of criminal laws. Yu Cong Eng v. Trinidad, 271 U. S. 500, 507, 46 S. Ct. 619, 70 L. Ed. 1059; Truax v. Raich, 239 U. S. 33, 37, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283."

While it is true that the petitioners had in their answer the allegations set forth on pages 13 and 14 of their brief, likewise it was admitted in the pleadings that the Nebraska State Railway Commission, one of the defendants below, while finding and holding that the colored "brakemen-porters," both from a safety standpoint and a service standpoint, were qualified to and were competently handling the job of brakeman, nevertheless, were of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 were not operated by employees bearing the titles set forth in Section 74-519 "which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929" (pp. 6-7, Pr. Rec.).

All of the defendants, including the Attorney General, in the joint answer allege, in Paragraph VI, that plaintiff operated its trains with a crew consisting, in addition to the engine crew, of one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman and porter, *"but deny that such operation fully meets all requirements and intendments of said statute"* (p. 22, Pr. Rec.).

Also, in Paragraph VI of the answer, the defendants deny that the statute makes no requirement as to how the plaintiff shall entitle its employees on the trains in question.

The answer admits that trains Nos. 109 and 110 make some 1,460 train movements in a year, and the answer admits that the maximum possible fine of $1,000.00 for each conviction would represent gross fines of $1,460,000.00 per year (Par. X, p. 26, Pr. Rec.).

It is apparent that it is the attitude of the appellants, notwithstanding all of their admissions, that the Missouri Pacific does not comply with the statute.

Appellant had been harassed with three hearings before the Railway Commission.

If the appellee is to employ colored men as brakemen, it cannot simply designate them "brakemen," even though, in fact, they only do porter work, when their brakemen's duties will permit. The reason is because the white union, the Brotherhood of Railway Trainmen, objects to colored trainmen, even though doing brakemen work 100%, being designated as "brakemen," thus receiving the same appellation as the white brakemen. The

paradoxical situation then obtains of this same union contending that, as the colored trainmen doing the brakemen's work are designated "brakemen-porters," because they in fact do some additional porter work, therefore the statutory requirement of "one brakeman" is not complied with. This is certainly blowing hot and cold. In fact, it is making a travesty of the laws involved, and is an obvious attempt to use the regulatory statutes of the state for confessedly selfish purposes, and without even the veneer of pretense that the public good is sought to be served.

It is apparent that the name "brakemen," as applied to a train service employee, is more or less of a misnomer. The operation of passenger trains by air-brake system is so efficient that the train service employee or brakeman is not subjected to the stopping of a train by the use of hand-brakes. The only time a train service employee would have occasion to use brakes would be where a car was set out on a siding to be left there unattended.

In an attempt to oust the colored man and to obtain these jobs, Mr. Moredick, the official of the white union, instituted the proceedings before the Nebraska State Railway Commission. That this was his intention was stated in evidence. This evidence is pleaded in the petition and admitted in the answer.

No question of the public safety is involved and no question of service is involved.

The respondent had been harassed with three hearings before the Commission, instituted by Mr. Moredick. It turned the matter over to the Attorney General's of-

fice. That defendant in his answer still insists that the Company fails to comply with the law, as set out above.

Having in mind that these trains are being operated daily, and that every time the train operates an offense is committed if, in truth and in fact, the appellee does violate the statute; having in mind the enormity of the penalties provided, and having in mind that the law enforcement officers are sworn to enforce the laws, the appellee had the right to come into a Court of Equity to enjoin the carrying out of the erroneous interpretation of the statute, especially where all of the facts are admitted and where it is simply a question of law as to whether or not the Company's admitted actions meet the requirements of the statute.

Judge Donohoe was of the opinion that there was no need for further evidence. He read the petition and the answer of the defendant and was of the opinion that on the facts admitted to be true in the appellant's answer, the appellee was entitled to equitable relief.

Appellee could have instituted a declaratory judgment suit under the 1934 Federal Act, asking the Court to declare whether it complied with the statute involved.

It is said in Vol. 16, Amer. Juris., Sec. 24, p. 296—

"Statutes, Ordinances, etc. — Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes, ordinances, and other governmental regulations. The Uniform Act expressly enumerates these questions among those which may be determined thereunder, and other declaratory judgment acts contain similar provisions. Moreover, there is authority to the effect that declaratory judgments

upon these questions may be rendered even though the statute applicable does not so provide in express terms. Thus, the Federal Declaratory Judgments Act, although it does not mention declarations as to the construction or validity of statutes, has been invoked frequently as a means of assaying the constitutionality of congressional legislation."

In Mr. Borchard's book entitled "Declaratory Judgment," the author says on page 560:

"Constitutionality and validity being conceded, the construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common quest of declaratory action. We shall not here attempt to discuss the many cases involving contracts, wills, bankruptcy, and almost every conceivable type of legal relation the determination of which turns indirectly upon the construction or interpretation of a statute. The present section will be confined solely to those cases in which the statute or ordinance is directly and immediately placed in issue, by demand for its construction or interpretation. The consequences and effects of that construction or interpretation—the secondary but real goal of the action—often depend upon the meaning of a single word or term in the statute and upon the application of the statute to the plaintiff or his business and the powers or duties of a public body, whether placed in issue by an interested private party or by the administration itself. The clarification of statutory rights, powers, privileges, and immunities is of growing importance in the solution of conflicts not only between the Government and the individual, in which relation the issue most frequently arises, but more and more under the control of statutory regulation. The issue is usually narrowed to a precise point, the solution of which determines the entire issue between the parties."

On page 15 of petitioner's brief petitioners call attention to the fact that there are some decisions to the effect that a law enforcement officer may not be enjoined from enforcing a valid State enactment, even though they are misconstruing the law. *This was the principal contention of the petitioners below.*

Judge Gardner, in his opinion, commencing on page 43 of the printed record, discusses this proposition, and after citing a number of cases quotes at length from the decision of this Court in *Philadelphia Co. v. Stimson*, 223 U. S. 605. This case clearly holds that equity has authority to restrain criminal prosecutions threatened by law enforcement officers of a state under a misconstruction of a State statute. To demand that the respondent discharge its colored brakemen and employ white brakemen in their stead, under the statute involved, amounts to an illegal demand. The Court in the cited case said—

> "And a similar injury may be inflicted and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is gulity of an invasion of private property."

In the case at bar, the Attorney General and the other defendants, i. e., the law enforcement officers of the State of Nebraska are insisting that the respondent is violating the statute involved.

In the case of *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, this Court held, in discussing the power of a court of equity to grant injunction to restrain an officer from enforcing a statuate—

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional."

The Circuit Court of Appeals came to the conclusion, as did the lower court, that the enforcement of the statute as construed by the petitioners, involved a property right of the respondent and would subject the respondent to a multiplicity of prosecutions, and would subject it to a maximum possible fine of $1,000.00 for each conviction and, as there were some 1,460 train movements in a single year made by the two trains involved, and as each train movement would be a separate offense, if operated with a crew in violation of the statute, the gross penalties for a year, on these two trains, might aggregate a million and a half dollars.

It is in the record that there were three hearings before the Railway Commission. It is in the record that the petitioners alleged in their answer that respondent did not comply with the Full Train Crew Law, and was operating its trains in violation thereof. Such being the position of the law enforcement officers, as set forth in their answer, respondent did not have to wait indefinitely.

In the case of *Missouri Pacific Railroad Co. v. Norwood, Attorney General of Arkansas, et al.*, 42 F. (2d) 765, there was involved a Full Crew Bill. In the cited case it was claimed that it was unconstitutional. The defendants filed a motion to dismiss, claiming it was a suit against a state. This contention was overruled, the Court citing numerous cases.

A second ground of the motion was that it was not allowable because the suit sought to enjoin the enforce-

ment of a criminal statute, in that the plaintiff had not availed itself of the full and complete remedy that it had under the laws of the State. The Court, in overruling the second ground, stated that obviously a property right of the plaintiff was involved, and that where such is the case, and where a multiplicity of prosecutions are involved, a court of equity may intervene even though the effect is to enjoin the enforcement of criminal laws.

A third ground was based on the claim that no appeal had been taken from prosecutions which had gone to judgment and that the plainitff should have availed itself of an appeal from the Justice of the Peace to the State Circuit Court, thence to the State Supreme Court, etc. The Court said—

> "If the violations covered by such judgments were all that were involved in this proceeding, there would be much force in the above suggestion. But where the statutes provide (as here) that 'each freight train' so run and each switching 'crew' so operated shall be a separate offense, and where the purpose of the bill is to prevent all prosecutions in the future, the inadequacy of the above procedure is evident. While the tedious journey of appeal through three consecutive courts is being traveled, the plaintiff is compelled to submit to the statutes and undergo losses it can never recover."

We are of the opinion that the law involved is properly set forth in the following rules of law, as deduced from the supporting authorities cited:

I.

Notwithstanding the constitutionality of a statute, one affected is entitled to injunctive relief against criminal prosecutions threatened by the law enforcement officers of a state because of their wrongful misconstruction of the statute involved (Full Crew Statute).

A valid law may be wrongfully interpreted and administered by the officers of a state so as to make such administration an illegal exaction upon the individual, entitling him to equitable relief.

Likewise, such equitable action is not a suit against the state as an erroneous administration of a valid statute to the injury of the individual is an act without legal sanction, and is not protected by the official status of those sought to be enjoined.

Greene v. Louisville & I. R. Co., 244 U. S. 499.

Philadelphia Company v. Stimson, 223 U. S. 605, 56 L. Ed. 570.

Smith v. Tillitson, 29 F. (2d) 535 (C. C. A. 8, 1928).

Davies, Sheriff, et al., v. Mills Novelty Co., 70 F. (2d) 424 (C. C. A. 8, 1934).

Royal Baking Powder Co. v. Emerson, 270 F. 431 (C. C. A. 8, 1920).

Weyman-Bruton Co. v. Ladd, 231 F. 898 (C. C. A. 8, 1916).

Boynton, Attorney General of Kansas, et al., v. Ellis, 57 F. (2d) 665 (C. C. A. 10, 1932).

Chambers v. Bachtel, 55 F. (2d) 851 (C. C. A. 5, 1932).

Morgan v. Nolan, 3 F. Supp. 143 (D. C. S. D., Ind., 1933).

Dearborn Publishing Co. v. Fitzgerald, 271 F. 479 (D. C. N. D., Ohio, 1921).

Mahoney, et al., v. Carolene Products Co., 2 F. (2d) 366 (C. C. A. 1, 1924).

Stuart, et al., v. Utility Investing Corporation, 78 F. (2d) 279 (C. C. A. 3, 1935).

II.

Such equitable jurisdiction to restrain criminal prosecutions under such circumstances exists when the prevention of such prosecutions is essential to the safeguarding of rights of property, and appellee, in the case at bar, has property right in its employment contract with trainmen designated "brakemen and porters."

Truax v. Raich, 239 U. S. 32.

Missuri Pacific Railroad Corporation v. Norwood, Attorney General of Arkansas, 42 F. (2d) 765.

American Steel & Wire Co. v. Davis, 261 F. 800.

III.

Likewise, where a multiplicity of prosecutions under erroneous construciton of regulatory statute are involved, a court of equity may intervene, even though the effect is to enjoin the enforcement of criminal laws.

Missouri Pacific Railroad Company v. Norwood, Attorney General of Arkansas, 42 F. (2d) 765.

Yu Cong Eng v. Trinidad, 271 U. S. 500, 507.

Truax v. Raich, 239 U. S. 33, 37.

IV.

Likewise, equitable relief may be granted to restrain prosecutions under erroneous construction of statute by enforcement officers where threatened action involves a multiplicity of separate offenses and where threatened action would deprive the individual of its property with-

out due process of law and will deny the individual the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375.
Iowa & Des Moines Natl. Bank v. Bennett, 284 U. S. 239.

V.

Likewise, where, as in the case at bar, the statute involved was one providing the complement of train crews on passenger trains operated by railroad in Nebraska, and where it is admitted that under interpretation of enforcement officers, as there would be some 1,460 train movements in a single year and as the maximum possible fine is one thousand dollars for each conviction, and as each train movement would be a separate offense, if operated with a crew in violation of the statute, gross penalties for a single year on two trains, might aggregate $1,460,000.00, the Railroad Company involved is entitled to invoke the equitable jurisdiction of the Federal Court to restrain enforcement of the statute as interpreted and construed by the enforcement officers.

Panama v. Ryan, 293 U. S. 388.
Royal Baking Powder Co. v. Emerson, 270 F. 431 (C. C. A. 8).
National Remedy Co. v. Hyde, 50 F. (2d) 1066.

In *Sterling vs. Constantin*, 287 U. S. 378, 77 L. Ed. 375, in which this Court found that an alien employee was entitled to an injunction against the Governor of Texas, enjoining him from regulating the production of oil under a declaration of martial law, the Court said:

"* * * The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under

state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. Ex parte Young, 209 U. S. 123, 155, 156, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 292, 293, 57 L. ed. 510, 516, 517, 33 S. Ct. 312; Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 S. Ct. 7, Ann. Cas. 1917B, 283; Cavanaugh v. Looney, 248 U. S. 453, 456, 64 L. ed. 354, 357, 39 S. Ct. 142; Terrace v. Thompson, 263 U. S. 197, 214, 68 L. ed. 255, 274, 44 S. Ct. 15. The Governor of the State, in this respect, is in no different position from that of other state officials. See Davis v. Gray, 16 Wall. 203, 210, 233, 21 L. ed. 447, 452, 457; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 81 A. L. R. 1402, 52 S. Ct. 595; Binford v. McLeaish, 284 U. S. 598, 76 L. ed. 513, 52 S. Ct. 207; (D. C.) 52 F. (2d) 151, 152; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 246, 76 L. ed. 265, 272, 52 S. Ct. 133; Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 434, 70 L. ed. 664, 666, 46 S. Ct. 331."

In the case of *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265, Mr. Justice Brandeis, in the opinion of the Court, said:

"The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. Virginia v. Rives, 100 U. S. 313, 318, 25 L. Ed. 667, 669, 3 Am. Crim. Rep. 524; United States v. Harris, 106 U. S. 629, 639, 27 L. ed. 290, 294, 1 S. Ct. 601.

> But acts done 'by virtue of a public position under a State Government * * * and in the name and for the State,' Ex parte Virginia, 100 U. S. 339, 347, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. * * *"

and in the footnote—

> "Cases discussing the question of what constitutes a suit against the State within the meaning of the 11th Amendment, such as Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; Western U. Teleg. Co. vs. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 S. Ct. 286; Looney v. Crane Co., 245 U. S. 178, 62 L. ed. 230, 38 S. Ct. 85; Public Serv. Co. v. Corboy, 250 U. S. 153, 63 L. ed. 905, 39 S. Ct. 440, have no bearing upon the power of this Court to protect rights secured by the federal Constitution."

It is apparent from the facts alleged in the petition filed below and admitted in the answer; that the respondent was and is complying, in every respect, with the Nebraska Full Crew Bill as properly interpreted, and that the construction placed on the law by the petitioners herein is entirely unwarranted. The petitioners herein were the enforcement officers of the State, and if respondent is violating the statute, would be obligated to enforce the penalties provided in the statute (Sections 84-204 and 26-901 to 911, Comp. Statutes of Nebr., 1929). Thousands of train movements are involved. Possible

maximum fines of over $1,000,000.00 confronted respondent. Respondent had been subjected to three hearings before the State regulatory body of the Nebraska State Railway Commissioner. Petitioners still insisted in their answer that respondent was violating the statute. Under such circumstances where there was no dispute as to what the facts were, where the dispute was as to the interpretation of the statute and the meaning of the statute, and where the dispute between the parties was whether or not the crew furnished the trains in question was in compliance with the statute, and where no State decision has been had, Federal Courts in Equity had jurisdiction to restrain the enforcement of the statute as interpreted by the officers, to protect the property rights and the right of contract of the respondent and to avoid a multiplicity of suits.

To refuse to do this would be, in our opinion, to take a step backward; would be to overlook the modern tendency to simplify court procedure, which seeks the decision of law propositions in dispute, without subjecting the parties involved to a contest involving procedure usually provided for the prosecution of criminals.

CONCLUSION

We submit that the petitioners' application should be dismissed; that it lacks any substantial grounds for the granting of a writ of certiorari. It is an attempt to obtain another hearing on matters peculiar to this controversy, and to this controversy alone.

We therefore respectfully request that petitioners' petition for a writ of certiorari be denied.

Respectfully submitted,

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May 31, 1940.

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SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1940.

Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Petitioners,
vs.
Missouri Pacific Railroad Corporation in Nebraska.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 20, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether respondent, plaintiff in the district court below, has established a cause of action in equity entitling it to a decree enjoining petitioners, the Attorney General of Nebraska and other state officers from prosecuting respondent's agents and officers in the state courts for criminal violations of the Nebraska Full Train Crew Law, § 74-519 Comp. Stat. of Nebraska, 1929.

The statute makes it unlawful for any railroad in Nebraska to operate any passenger train of more than five cars "with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman". Passenger trains of five cars or less are required to be operated with a like crew, except that only "one brakeman or flagman" is required instead of the one brakeman and one flagman required in the case of trains of more than five cars. By § 74-522, officers or agents of railroads dispatching trains in violation of the statute are guilty of a misdemeanor punishable by fine of not less than $100 nor more than $1,000 for each offense and the railroad is made liable for any damage caused by violations.

Respondent's bill of complaint invoked the jurisdiction of the district court on grounds of diversity of citizenship. The facts alleged, so far as now material, are as follows. Respondent operates two trains in Nebraska, on which it assigns for the performance of the duties of a brakeman or flagman required by the statute, colored employees who are fully qualified to perform and do perform those

duties, but who are designated as "brakemen-porters" and paid lower wages than are respondent's white "brakemen".

On complaint lodged with the State Railway Commission by an officer of the Brotherhood of Railroad Trainmen it was alleged that respondent violated the statute, by employing brakemen-porters to perform the services of brakemen or flagmen. The Commission twice dismissed the complaint, but upon rehearing it ruled that although respondent's brakemen-porters, in addition to the duties of brakemen, when performance of such duties permit, render some services as porters, they competently perform the duties to which they are assigned, namely those of brakemen or flagmen, and that respondent's trains, so far as the public safety is concerned, are adequately manned. The Commission declined to pass upon the question whether their employment in the manner alleged complied with the Full Train Crew Law of the state and ordered that the records in the case be made available to the state attorney general for his use, if so advised, in prosecuting respondent for violation of any criminal statute of the state.

The bill of complaint also alleges that employment of white brakemen for the services now performed by respondent's brakemen-porters will compel it to pay an increase of wages in excess of the jurisdictional amount, and that as each train movement involves an alleged violation of the statute, numerous prosecutions for violations, which petitioners threaten, will result in imposing on respondent the burden of many litigations in the state criminal courts. Such prosecutions, if successful, it is alleged, will result in the imposition of aggregate fines in excess of $1,000,000 a year. The relief prayed is that the threatened prosecutions be declared to be unauthorized by the statute, and that petitioners be enjoined from interfering with the operation of respondent's trains through criminal prosecution or otherwise.

After denial by the district court of petitioners' motion to dismiss the bill of complaint for want of equity, petitioners answered denying among others the allegations that respondent is threatened with multiplicity of criminal suits or that petitioners intended to proceed with prosecutions for violation of the statute, except as specifically stated in the answer. The answer sets up affirmatively that the attorney general has under consideration the question of respondent's compliance with the statute, and in the event that he

should determine that it is "necessary and proper to do so" in order to obtain a judicial determination of the question, he would cause a single test suit to be instituted in the state courts for some one alleged violation of the act by respondent, so conducted as to cause a minimum of financial expense to respondent and without seeking to inflict financial penalties or loss on respondent prior to a final determination of the suit in the state courts.

The district court, without trial of any issue of fact, gave its decree for respondent, on the pleadings, for an injunction as prayed. The Court of Appeals for the Eighth Circuit affirmed. 108 F. (2d) 897. We granted certiorari, October 14, 1940, on a petition which challenged the equity jurisdiction of the district court to enjoin, in the circumstances, a criminal proceeding in the state courts, the question being of public importance since it involves the appropriate relationship of the federal to the state courts.

The court of appeals, construing the statute, held that the crews on respondent's trains conform to the statutory requirements; that criminal prosecution of respondent's officers is unauthorized by the Act and unlawful. It supported the exercise of the equity powers of the court to restrain the prosecutions on the ground that the attempted enforcement of the statute as construed by petitioners would subject respondent to a multiplicity of such prosecutions and to the risk, if petitioners' construction of the statute should be sustained, that fines or penalties aggregating a large amount would be imposed.

It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. *In re Sawyer*, 124 U. S. 200, 211; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Packard* v. *Banton*, 264 U. S. 140, 143; *Tyson* v. *Banton*, 273 U. S. 418, 428; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 452.

This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged viola-

tion of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. *Harkrader* v. *Wadley*, 172 U. S. 148; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. *Hygrade Provision Co.* v. *Sherman, supra; Fenner* v. *Boykin*, 271 U. S. 240.

Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury. Cf. *Hygrade Provision Co.* v. *Sherman, supra; Cline* v. *Frink Dairy Co., supra; Spielman Motor Co.* v. *Dodge, supra.* And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Insurance Association*, 296 U. S. 64, 73, and cases cited.

Here the court below found danger of irreparable injury in the threatened multiplicity of prosecutions and risk that the aggregate fines which might be imposed would be very large. But whether more than one criminal prosecution is threatened was by the pleadings made an issue of fact which the district court did not resolve. If it had found after a hearing, as the answer alleges, that only a single suit is contemplated, we could not say that any such irreparable injury is threatened as would justify staying the prosecution and withdrawing the determination of the legal question from the state courts, whose appointed function is to decide it. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 287; *Spielman Motor Co.* v. *Dodge, supra*, 96.

If its decision should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they

may well be the consequence of violations of state law. No question is here presented of the constitutional validity of the statute because the penalties which it inflicts are so great as to prevent recourse to the courts for the adjudication of respondent's rights under it. See *Ex parte Young*, 209 U. S. 123, 144; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 349.

It does not appear that any motion was made by the parties for judgment on the pleadings. But the record shows that the trial court entered the decree in respondent's favor on its own motion. Upon such a motion denials and allegations of the answer which are well pleaded must be taken as true. So taken the decree for respondent cannot be sustained and must be reversed. The majority of the Court are of opinion[1] that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1] The CHIEF Justice, Mr. Justice MCREYNOLDS and Mr. Justice STONE are of opinion that the case should be remanded to the district court for further proceedings.